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IN THE

Supreme Court of the United States

No. 355

_____ TERM, 1953

W. B. FOLLETT, *Petitioner*,

v.

HUGH A. VOSS, DEPUTY COMMISSIONER, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Of

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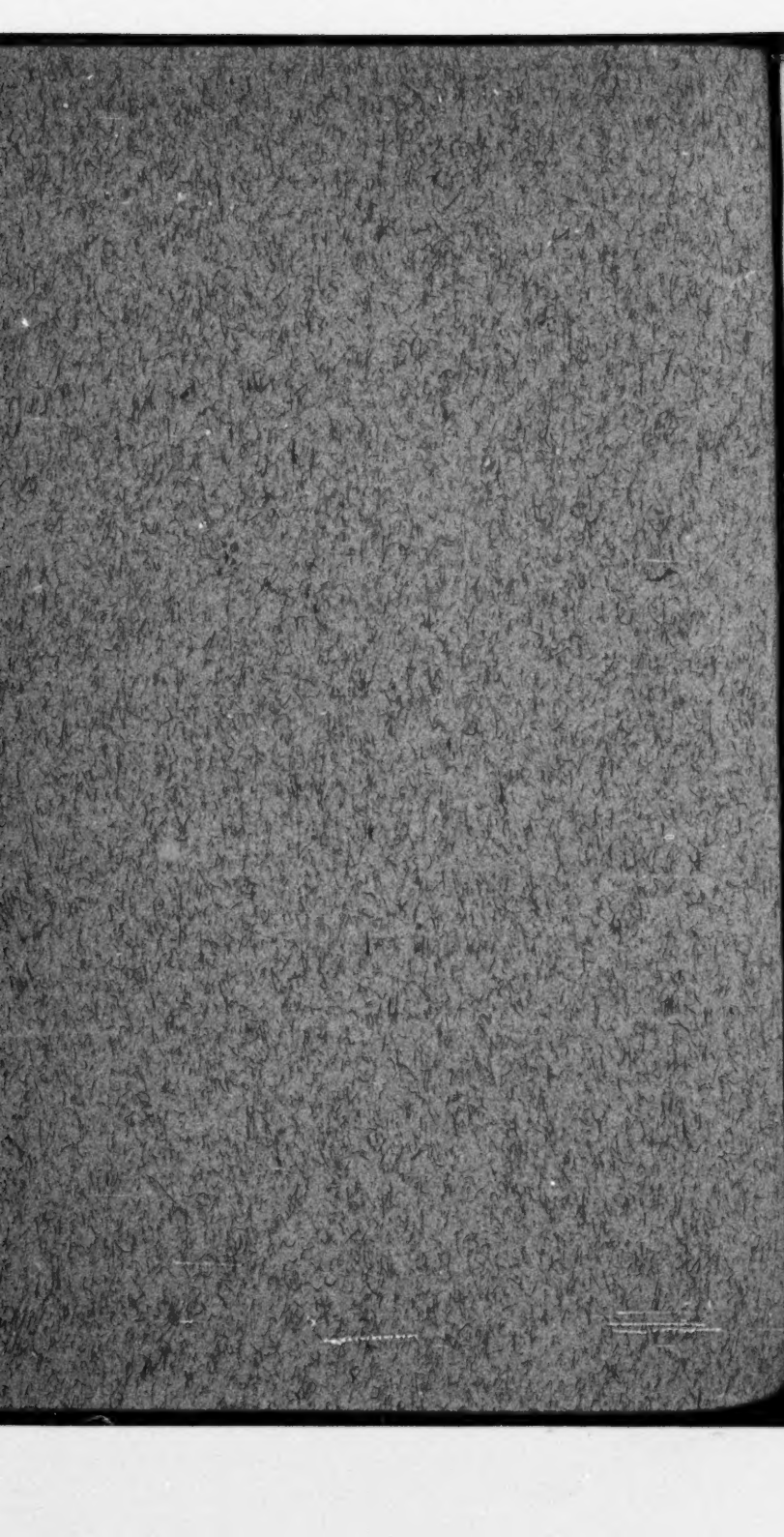

SUBJECT INDEX

	PAGE
OPINIONS OF THE COURTS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
SUMMARY OF THE MATTER INVOLVED	3
SPECIFICATIONS OF ERROR TO BE URGED	4
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	14

LIST OF AUTHORITIES

CASES

Baltimore & Philadelphia Steamboat Co. v. Norton, 52 S. Ct. 187, 248 U.S. 408, 76 L. Ed. 366	4, 5, 6, 13
Bethlehem Steel Co. v. Parker, Deputy Commissioner (C.C.A. 4th Cir.), 163 F. 2d 334	14
Grays Harbor Stevedore Co., et al., v. Marshall, 36 F. 2d 814	9
Luckenbach S.S. Co., Inc., v. Norton (C.C.A. 3rd Cir.), 106 F. 2d 137	13
Maryland Casualty Co. v. Laughlin, 29 F. 2d 343	9
O'Rourke v. Pennsylvania Railroad Co., 344 U.S. 344, 73 S. Ct. 302 (1953)	11
Security Mutual Casualty Co. v. Wakefield, et al. (C.C.A. 5th Cir.), 108 F. 2d 273	13
Texas Employers' Insurance Ass'n v. Sheppard, 1 Fed. Supp. 867 (D.C. Tex.)	8
Travelers Insurance Co., et al., v. Branham, Deputy Commissioner (C.C.A. 4th Cir.), 136 F. 2d 873	13

STATUTES

Longshoremen and Harbor Workers' Act, Title 33, Sec. 11(b), United States Code Annotated	2
Secs. 906(b), 908(c), 3 and 19	10, 12
Sections 902(10), (13), 910(a) to (e)	12
26 U.S.C., Sec. 1254(1)	2
Texas Statutes, Article 3806	9, 10

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HUGH A. VORIS, DEPUTY COMMISSIONER, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, W. B. Follett, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled and numbered cause.

Opinions of the Courts Below

The opinion of the Honorable District Judge T. M. Kennerly was filed on May 1st, 1952 and is reported in 104

F. Supp. p. 727. The opinion of the United States Court of Appeals for the Fifth Circuit was rendered on June 26, 1953, and at the time of preparation of this petition has not been reported in the Federal Reporter.

Jurisdiction

This proceeding was brought under the provisions of the Longshoremen and Harbor Workers' Act, Title 33, Section 11(b) UNITED STATES CODE ANNOTATED, in that the injury occurred upon navigable waters at Houston, Texas, within the Southern District of Texas, seeking review of the method of computation followed by the Deputy Commissioner in awarding Petitioner compensation for injuries under the Act.

The judgment of the Court of Appeals sought to be reviewed was rendered on June 26, 1952. The jurisdiction of this Court is invoked under Title 26, U. S. C., Section 1254 (1).

Questions Presented

Are injured Longshoremen suffering disability within the course of their employment, partial in character but permanent in quality, entitled to receive compensation for such partial disability as the percentage of such partial disability relates to Sixty-six and two-thirds per centum (66-2/3%) of the average weekly wage for the period provided for in the Statute as long as the amount of such percentage does not exceed Thirty-five Dollars ($35.00) per week, Sec. 906(b); or

Must Sec. 908(c) be wholly disregarded and the restricted view that the Thirty-five Dollars ($35.00) per week limitation provided for in Section 906(b) be followed as the criterion from which the percentage of disability must be computed?

Summary of the Matter Involved

On the 27th day of December, 1949, Follett, a Longshoreman, while in the employ of the Southern Stevedoring Company, Inc., aboard the SS JAMES McKAY, suffered injury within the course of his employment. Within the time and in the manner required by law he filed his claim with the United States Deputy Commissioner under the Harbor Workers' Act, Title 33, Section 901 et seq. claiming compensation for disability to his left hand. On April 3, 1951, the Deputy Commissioner, pursuant to and in accordance with stipulation entered into by the parties, filed his findings of fact and conclusions of law. In accordance with the stipulations the Commissioner found Petitioner to have suffered fifteen per centum (15%) permanent partial disability to his left hand, and that his average weekly wage was One Hundred Three Dollars ($103.00).

Petitioner (Libellant below) contended and contends that under Section 908(c), he is entitled to fifteen per centum (15%) of Sixty-six and two-thirds per centum (66-2/3) of his average weekly wage for a period of two hundred twelve (212) weeks since fifteen per centum (15%) of Sixty-six and two-thirds (66-2/3) of his stipulated average weekly wage does not exceed the Thirty-five Dollar ($35.00) per week limitation. The Deputy Commissioner, however, instead of allowing Petitioner:

$103. x 2/3 = $68.66 x 15% = $10.30 x 212 = $2,183.60, as provided by Statute,

reduced the 212 weeks statutory period [Section 908(c)] to:

212 weeks x 15% = 31.8 weeks x $35.00 = $1,113.00.

Thus the Commissioner, now with the Court of Appeals' approval took 15% of the $35.00 per week and multiplied

it by 212 weeks instead of taking 15% of 66-2/3rd % of his average weekly wages as required by Sec. 908(c) and multiplying it by 212 weeks.

The question for decision is one of law only, i.e., the correct method of calculating and computing the amount of compensation due weekly for permanent partial loss of use of a specific member of the human body under the applicable statutory provision.

Specifications of Error To Be Urged

The learned Court of Appeals for the Fifth Circuit erred in the following respects:

1) In holding that the Commissioner's method of computation (i.e. that the limitation of $35.00 per week must be followed when allowing compensation for permanent partial disability in spite of the express statutory provision 908(c) providing that under such circumstances compensation shall be sixty-six and two-thirds percentum (66-2/3%) of the average weekly wage and shall be paid for the statutory time of two hundred twelve (212) weeks for loss of the use of a hand) is correct.

2) In holding that in no event may an injured Longshoreman who suffers fifteen per centum (15%) partial disability to his hand receive more than fifteen per centum (15%) of Seven Thousand Four Hundred Twenty Dollars ($7,420.00) (that being the maximum recovery for the loss of a hand), i.e. One Thousand One Hundred Thirteen Dollars ($1,113.00), even though fifteen per centum (15%) of two-thirds (2/3rds) of his stipulated average weekly wage amounts to Two Thousand One Hundred Eighty-three and 60/100 Dollars ($2,183.60).

3) In holding that the case of BALTIMORE & PHILADELPHIA STEAMBOAT COMPANY v. NORTON, 52 S. Ct.

187, 248 U.S. 408, 76 L. Ed. 366, has settled the question in accordance with the decision of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

1) The decision of the Court below conflicts with this Court's expression in *Baltimore and Philadelphia Steamboat Company v. Norton*, 52 S. Ct. 187, 248 U.S. 408, 76 L. Ed. 366.

2) This appeal presents a broad and important question involving the construction and intent of an Act of Congress, affecting hundreds of thousands of workers coming under the Longshoremen & Harbor Workers Act.

3) The holding of the Court below violates Congressional intent as expressed in the statute that each injured workman, coming under the Act, shall receive compensation in accordance with his earning capacity, subject only to the limitation that in no event shall compensation, whether total or partial, exceed $35.00 per week.

4) The Harbor Workers' Act is a remedial statute and if the Act is subject to a construction that allows more liberal computation than that followed by the Commissioner, the Court must give expression to such Congressional intent and allow full compensation in accordance with Congressional intent.

---

1) The decision of the Court below conflicts with this Court's expression in *Baltimore and Philadelphia*

***Steamboat Company v. Norton*, 52 S. Ct. 187, 248 U.S. 408, 76 L. Ed. 366.**

This Court in BALTIMORE AND PHILADELPHIA STEAMBOAT COMPANY v. NORTON, supra, approved the formula contended for by Petitioner and frowned on the Commissioner's method of computation. There, as here, the Commissioner reduced the number of weeks allowed by statute for the specific loss by the percentage of disability suffered by the injured Longshoreman. At the time of the Norton decision, Sec. 906(b) provided that compensation for disability shall not exceed $25.00 per week (since then Congress amended the provision raising it to $35.00 per week). The injured workman suffered a forty per centum (40%) disability to his arm. His wage rate was Thirty-six & 06/100 Dollars ($36.06). Two-thirds (2/3rds) of such sum amounted to less than the statutory provision of Twenty-five Dollars ($25.00) per week, i.e., Twenty-four and 04/100 Dollars ($24.04). The Commissioner reduced the number of weeks by forty per centum (40%) and allowed Twenty-four & 04/100 ($24.04) Dollars for the thus reduced number of weeks. Because of the low wage rate the total of the payments were the same. But this Court was not satisfied with the computation stating as follows:

> "The deputy commissioner did not apply the proportionate rate, $9,616, to the 280 weeks remaining, but added to the 34 weeks 40 per cent. of 280 (being 112) and applied the full rate for 146 weeks. The total of the payments is the same in either case. The computation employed shortens the statutory period and correspondingly increases the weekly payments. *Petitioners raise no question as to that feature of the award, and therefore we need not consider whether it is consonant with the act*". (Italics ours).

But this Court did consider Sec. 908(c) and sub-section 19 thereof, reading them in pari materia and construing them as petitioner contends (52 S. Ct. 188) i.e., that these sections require allowance as compensation for permanent partial disability for the number of weeks provided for by statute (loss of use of hand 212 weeks) at a rate that is the same proportion of two-thirds (2/3rds) of the weekly wage as partial disability is of the total loss of use. Sec. 908(c) (18), (19).

What is the proportion of two-thirds (2/3rds) of the weekly wage of petitioner here as such partial disability is of total use? The answer is obvious. It is fifteen per centum (15%) of two-thirds of his average weekly wage, i.e., Ten & 30/100 Dollars ($10.30). This amount must be multiplied by two hundred twelve (212) weeks, entitling him to Two Thousand One Hundred Eighty-three & 60/100 Dollars ($2,183.60) instead of One Thousand One Hundred Thirteen Dollars ($1,113.00) as allowed by the Commissioner.

If there be any further doubt of Congressional intent as to computation under these sections it is completely dispelled by the kind of decree this Court in the NORTON case ordered to be entered:

> "The decree will be modified so as to allow the full rate of $24.04 for only 32 weeks and *proportionate compensation of 40 per cent, FOR 282 weeks*". (Emphasis added).

Had this Court approved even indirectly of the Commissioner's computation, it would have used the words 40 per cent. OF 282 weeks instead of "40 per cent FOR 282 weeks".

We submit the NORTON case has set the formula to be followed in computing partial disability, permanent in

character. The fact that the cost of living has increased to such a point that wages have correspondingly increased does not and cannot change the formula. It must remain the same.

The method of computation sought by the Petitioner does not, as stated by the Court of Appeals, do violence to the statutory provisions applicable here. Petitioner does not disregard the Thirty-five Dollars ($35.00) fixed as the maximum weekly compensation rate for disability. Indeed, Petitioner is, as he must be, bound by the Thirty-Five Dollars ($35.00) maximum weekly rate, but points out that the Court of Appeals is in error when it construes the Thirty-Five Dollars ($35.00) maximum to be substituted for the amount of Sixty-six and two-thirds per centum (66-2/3%) of the average weekly wage where that amount actually exceeds Thirty-five Dollars ($35.00). Equally erroneous is the Court of Appeals' statement that Petitioner arrives at what it terms a "forbidden rate" of Sixty-eight & 66/100 Dollars ($68.66) by taking fifteen per centum (15%) of the average weekly wage of One Hundred Three Dollars ($103.00). All petitioner contends for is that the courts follow the language of Section 908(c):

> "In case of disability partial in character but permanent in quality the compensation shall be sixty-six and two-thirds per centum of the average weekly wage", and that "compensation (Section 19) for permanent partial loss or loss of use of a member may be for proportionate loss or loss of the use of a member".

Two cases under the Harbor Workers Act which discuss the problem are not in point. In TEXAS EMPLOYERS' INSURANCE ASSOCIATION v. SHEPPARD, 1 Fed. Sup. 867 (D.C. Texas), sixty-six and two-thirds per centum (66-2/3%) of the average weekly wage of the injured employee was

below the limitation provided for in Section 906(b) (then $25.00 per week), and apparently the same situation existed in the GRAYS HARBOR STEVEDORE CO., ET AL., v. MARSHALL, 36 F. 2d 814 and hence the problem presented here was not discussed.

The Court of Appeals had considered the same question under the Texas Statute, Article 3806(12), REVISED CIVIL STATUTES OF TEXAS, in MARYLAND CASUALTY CO. v. LAUGHLIN, 29 F. 2d 343. At the time the LAUGHLIN case was considered the maximum compensation allowed was $20.00 per week. The jury found the injured workman to have suffered 25% disability. The insurer, as here, contended for a computation of 25% of $20.00, (the maximum compensation rate then allowed by statute) or Five Dollars ($5.00) per week. [The method used by the Commissioner in the case at bar is exactly the same, i.e., 15% of $35.00 (the maximum allowed by Sec. 906(b) as Amended) = $5.25 × 212 = $1,130.00]. The District Court in the LAUGHLIN case took 25% of 60% of the injured workman's weekly wage amounting to $10.38 and multiplied it by the number of weeks provided for such loss by statute. The same Court of Appeals sustained the District Court, as follows (p. 345):

> "The ground of the contention of appellant that the weekly compensation allowable to appellee was 25 per cent of $20.00 is indicated by the following assignment of error:
>
> 'The District Court erred in not concluding and holding that in computing compensation for permanent partial incapacity the proper method of computation is to take 60 per cent of the average weekly wage, which in this case is shown to be $69.23, and to limit such 60 per cent to $20.00, and then multiply the said sum of $20.00 by the percentage of disability,

the result thus obtained to be the rate of weekly compensation which he is to be paid for the length of time in such case provided by law.'

"This contention is not warranted by the language of the statute: 'The compensation paid therefor shall be sixty per cent of the average weekly wages of the employees, but not to exceed $20.00 per week multiplied by the percentage of incapacity caused by the injury for such period not exceeding three hundred weeks as the board may determine.' What is forbidden by the quoted language to exceed $20.00 is the weekly compensation payable to the injured employee. *That language does not indicate a purpose to require the sum of $20.00 to be substituted for the amount of 60 per cent of the average weekly wages, where that amount actually exceeds $20.00.* Maryland Casualty Co. v. Ferguson (Tex. Civ. App.), 252 S.W. 854; Dohman v. Texas Employers' Insurance Assn. (Tex. Civ. App.), 285 S.W. 848."

A careful comparison of the applicable Texas Compensation statute with the permanent partial disability provision of the HARBOR WORKERS' ACT, Secs. 906(b), 908(c), 3 and 19 of 908 show their similar intent. In both statutes the average weekly wage rate of the injured workman is made the basis of the compensation rate. The Texas Statute provides [Art. 8306 (12)] for a weekly compensation of sixty per cent (60%) of the average weekly wage of such employee, but not less than $9.00 per week, not to exceed $25.00 per week. Then it provides:

"In the foregoing enumerated cases of permanent, partial incapacity, it shall be considered that the permanent loss of the use of a member shall be equivalent to and draw the same compensation as the loss of that member."

The HARBOR WORKERS' ACT provides 906(b) and 908(c)

for weekly compensation not to exceed $35.00 nor less than $12.00, and 908(c) dealing with temporary total disability for a compensation rate of 66-2/3rds percentage of the average weekly wage.

The Harbor Workers' Act must be construed as a whole, i.e., in pari materia, when Sections 906(b), 908 (c), 3, 18 and 19 are read together they say exactly the same thing. TEXAS EMPLOYERS' INSURANCE ASSOCIATION v. HOLMES, 196 S.W. 2d 390, affirmed 196 S.W. 2d 1023.

2) This appeal presents a broad and important question involving the construction and intent of an Act of Congress, affecting hundreds of thousands of workers coming under the Longshoremen & Harbor Workers Act.

The importance of this question presented requires a decision by this Court, involving as it does a Congressional law remedial in its nature, and affecting all workers coming under the provision of the Act. It covers not only Longshoremen but Dry Dock Workers, Boat Repair men and even some Railroad Workers. See O'ROURKE v. PENNSYLVANIA RAILROAD CO., 344 U.S. 344, 73 S. Ct. 302 (1953). The Court below either misconstrued this Court's decision in the NORTON case, supra, or the question has not been decisively passed upon by this Court. Since hundreds of thousands of workers are affected by the Act, petitioner submits that a clear cut expression by this Court is required on this vital point.

3) The holding of the Court below violates Congressional intent as expressed in the statute that each injured workman, coming under the Act, shall receive compensation in accordance with his earning capacity, subject only to the limitation that in no

event shall compensation, whether total or partial, exceed $35.00 per week.

Title 33 Sections 902 (10), (13), 906(b), 908(c), 3,13,19 and Sec. 910(a) to (e) constitute the Congressional guide by which compensation to injured workmen covered by the Act must be computed. Congress saw fit to allow compensation under the act based on the average weekly earning capacity of each individual, the only limitation being that "Compensation for disability shall not exceed $35.00 per week and compensaton for *total* disability shall be not less than $12.00 per week * * * etc." 906(b). Thus Congress saw fit to apply the rule of economic loss to the injured worker by taking into consideration his earning capacity with only the limitation that in no event shall the weekly compensation, whether it be total or partial disability, exceed Thirty-five Dollars ($35.00) per week. Indeed had Congress intended otherwise it would have simply said that compensation for *total* disability shall not exceed Thirty-five Dollars ($35.00) per week, and compensation for total disability shall be not less than Twelve Dollars ($12.00) per week. But not so. Congress did not say that the $35.00 should be substituted for the amount of two-thirds per centum of the average weekly wage where that amount actually exceeds it. No such restricted intendment is found in the Act. If there be any doubt of Congressional intent that loss of earning capacity is the measure to be applied, we only have to look at Sec. 910(a) to (e) of the Act to note the care with which Congress spelled out the method to determine the average weekly wage of the Worker under the Act.

4) The Harbor Workers' Act is a remedial statute and if the Act is subject to a construction that allows more liberal computation than that followed by the

Commissioner, the Court must give expression to such Congressional intent and allow full compensation in accordance with Congressional intent.

The rule is now generally accepted that Compensation Laws are to be construed liberally for the protection of employees. BALTIMORE & PHILADELPHIA STEAMBOAT CO., ET AL, v. NORTON, 52 S. Ct. 187, 284 U.S. 408, 76 L. Ed. 366. There it was held (p. 189):

> "Such laws are deemed to be in the public interest and should be construed liberally in furtherance of the purpose for which they were enacted and, if possible, so as to avoid incongruous or harsh results. Jamison v. Encarcion, 281 U.S. 635, 640, 50 S. Ct. 440, 74 L. Ed. 1082."

The following cases exemplify the same view:

SECURITY MUTUAL CASUALTY CO. v. WAKEFIELD, ET AL. (C.A.A. 5th Cir.), 108 F. 2d 273, holding:

> "The Workmen's Compensation Act should be given a broad and liberal construction so that it may accomplish the purposes for which it was enacted."

LUCKENBACH S.S. CO., INC. v. NORTON (C.C.A. 3rd Cir.), 106 F. 2d 137:

> "Appellant argues that there had been no change or mistake as contemplated by the section. But to follow such an interpretation would be to give the statute a narrowly technical and impractical construction."

TRAVELERS INSURANCE CO., ET AL. v. BRANHAM, DEPUTY COMMISSIONER (C.C.A. 4th Cir.), 136 F. 2d 873, in which the Court stated:

> "The Act, as a remedial statute, must be liberally construed. Baltimore & Philadelphia Steamboat Co. v. Norton, 284 U.S. 408, 52 S. Ct. 187, 76 L. Ed. 366, supra."

BETHLEHEM STEEL CO. v. PARKER, DEPUTY COMMISSIONER (C.C.A. 4th Cir.), 163 F. 2d 334, in which the court stated:

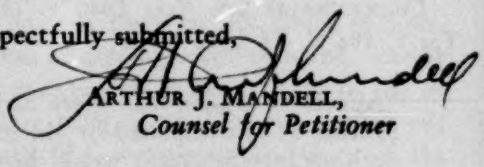
> "We agree entirely with the District Judge that the Act must be liberally construed as a remedial enactment; * * *."

Even a strict interpretation of the applicable statutory provisions to this case would command the computation contended for by Petitioner, but the Courts must follow the now well entrenched principle of law that such remedial statutes must be liberally construed.

Conclusion

For the foregoing reasons it is respectfully submitted that this Court should exercise its right of review to determine the construction of this statute, affecting as it does a large number of people, and grant Petitioner this Petition for Writ of Certiorari.

Respectfully submitted,



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Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR RESPONDENT, TEXAS EMPLOYERS' INSURANCE ASSOCIATION

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SUBJECT INDEX

	PAGE
Method No. 1	3
Method No. 2	3
The Norton Case	4
Other Courts in Accord with Norton Case	9
The Sheppeard Case—The District Court below Decided Landmark Case in 1932	9
One Court Uses Method No. 2	11
New York Courts in Accord with Norton Case	11
Sheppeard Case and Grays Harbor Case Not Distinguishable	12
Settled Administrative Practice Supports Deputy Commissioner and Courts Below	12
Petitioner Seeks Weekly Compensation Rate of $68.66 Whereas Statutory Maximum is $35 Per Week	13
Petitioner's Real Contentions Exposed	15
Texas Cases of No Benefit Here	15
No Showing Case Presents Matter of General Importance	18
Construction Below Does Not Thwart Congressional Intent	19
Cannot Amend Statute Under Guise of Liberal Construction	20
Petitioner Ignores Plain Statutory Mandate	20
Conclusion	20
Appendix A, Longshoremen's Act, Opinion No. 34 (Reported 1929 AMC 100)	23

LIST OF AUTHORITIES

CASES	PAGE
Baltimore & Philadelphia Steamboat Co. v. Norton, 40 F. 2d 530 (E.D. Pa., 1930)	9
Baltimore & Philadelphia Steamboat Co. v. Norton, 248 U.S. 408 (1931)	5, 6, 7, 8, 9
Baltimore & Philadelphia Steamboat Co. v. Norton, 48 F. 2d 57 (3 C.C.A. 1931)	9

CASES	PAGE
Billings v. Truesdell, 321 U.S. 542 (1944)	13
Crescent Wharf & Warehouse Co. v. Pillsbury, 54 F. 2d 1077	5, 9
Grays Harbor Stevedore Co. v. Rothchild & Co., 36 F. 2d 814 (D.C. Wash., 1929)	9, 11, 12, 14
Hartford Accident & Indemnity Co. v. Hoage, 85 F. 2d 411 (App., D.C.)	12
Luckenbach Steamship Co. v. Norton, 23 F. Supp. 829 (E.D. Pa. 1938)	9
Marshall v. Mahoney, 56 F. 2d 74 (9 C.C.A.)	12
Phonville v. New York and Cuba Steamship Co., 226 N.Y. 622, 123 N.E. 258	12
Pillsbury v. United Engineering Co., 342 U.S. 197	20
Southern Stevedoring & Contracting Co. v. Sheppeard, 1 F. Supp. 867 (D.C. Tex., 1932)	9, 10, 12
Texas Employers' Ins. Assn. v. Holmes, 196 S.W. 2d 390	15, 16
U. S. v. Chicago, North Shore & Milwaukee R.R. Co., 288 U.S. 1 (1933)	13

REVISED CIVIL STATUTES OF TEXAS

Article 8306, Sec. 12	16

UNITED STATES STATUTES

33 U.S.C.A. 906(b)	2, 4, 13, 16
33 U.S.C.A. 908(c)(3)	2, 16
33 U.S.C.A. 908(c)(19)	2, 6, 19, 20, 23

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HUGH A. VORIS, DEPUTY COMMISSIONER, ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR RESPONDENT, TEXAS EMPLOYERS' INSURANCE ASSOCIATION

TO THE HONORABLE JUDGES OF SAID COURT:

The petition herein seeks a review by this Court of those provisions of the Longshoremen's and Harbor Workers' Compensation Act which govern the compensation payable for a permanent partial loss of use of an injured employee's hand. Petitioner thus seeks to have this Court review this single question:

How much money is the appellant entitled to receive for a fifteen per cent permanent partial loss of use of his right hand?

Or, stated another way—

What is the proper method of computing the compensation to which appellant is entitled under the Longshoremen's and Harbor Workers' Compensation Act for a fifteen per cent permanent partial loss of use of his right hand?

The pertinent statutory provisions provide that for the complete loss or loss of use of a hand a workman is to be paid 212 weeks of compensation (33 U.S.C.A., Sec. 908(c)(3)), at a compensation rate not to exceed $35.00 per week (33 U.S.C.A., Sec. 906(b)). The compensation for the permanent partial loss of use of a hand may be for *proportionate* loss of use of the entire hand (33 U.S.C.A., Sec. 908(c)(19)).

This is a clear statutory mandate that the economic value of a workman's hand for compensation purposes is $35.00 per week for 212 weeks, which amounts to the total sum of $7,420.00. This value, of course, holds true only if the man makes in excess of $52.50 per week, so that in arriving at his weekly compensation rate, two-thirds, of his average weekly wages is $35.00 or greater. It makes no difference how much more than $52.50 per week the workman might make, as far as the economic value of his hand is concerned for compensation purposes, for this value remains at $7,420.00 as long as he earns $52.50 per week or more. Of course, the problem with which we are confronted here is what is *proportionate* compensation to the petitioner for a fifteen percent permanent partial loss of use of his right hand. As above computed, the economic value of the whole

hand is $7,420.00. Thus, fifteen per cent of that figure ($1,113.00) is the economic value for compensation purposes of a fifteen per cent loss of use of that hand. Under the clear statutory language, there are only two methods by which such a proportionate figure can be obtained. These are as follows:

Method No. 1

The period allowed by the statute for total loss of use of the hand of 212 weeks may be made proportionate by taking fifteen per cent of the total of 212 weeks, and paying compensation at the full rate of $35.00 per week. Applied to the present case, this makes the mathematical computation as follows:

212 weeks × 15% = 31.8 weeks × $35 = $1,113.00

(Note: This is the method used by the Deputy Commissioner in his award, which has been approved and affirmed by both courts below).

Method No. 2

The maximum weekly compensation rate of $35.00 may be made proportionate by taking fifteen per cent of the $35.00 and paying compensation at this proportionate rate for the full period of 212 weeks. Applied to the present case, this makes the mathematical computation as follows:

$35 × 15% = $5.25 × 212 weeks = $1,113.00

From a reading of petitioner's brief, it would appear that he is complaining bitterly that his compensation for permanent partial loss of use of his right hand was paid to him over a period of only 31.8 weeks instead of a period of 212 weeks. The petitioner's actions subsequent to the Deputy Commissioner's award belie this impression, for the peti-

tioner has actually cashed the check paid to him under the Deputy Commissioner's award for the permanent partial loss of use of his right hand. Petitioner does not really want to receive proportionate compensation for a period of 212 weeks, indeed he has clearly indicated this by his own actions. What petitioner hopes to do is to have this Court award him compensation which is, in effect, equal to a 29% loss of use of his right hand rather than the agreed 15% loss of use. The sum petitioner seeks, $2,183.60, is more than 29% of the sum petitioner would be entitled to had he lost the use of his entire hand.

The reason petitioner seeks to leave the impression in his brief that he should receive his compensation for the full period of 212 weeks, which, under his computation, amounts to $2,183.60, is really quite simple. For if petitioner sought to obtain this money in a lump sum, the only way it could be done would be for him to make the absurd and ridiculous contention that the statutory period of weeks should be multiplied by 15% to obtain 31.8 weeks and then multiply that by 66-2/3% of his average weekly wages, which is $68.66. This would make the computation as follows:

212 weeks × 15% = 31.8 weeks × $68.66 = $2,183.60.

Such a computation is clearly forbidden by Section 6(b) of the Act (33 U.S.C.A., Section 906(b)), for the computation uses a compensation rate of $68.66.

Yet petitioner seeks to have this Court use the same $68.66 rate and reach the same absurd and ridiculous result with the method of computation he suggests.

The Norton Case

Petitioner contends that the decisions of the courts below are in conflict with this Court's decision in BALTIMORE

& PHILADELPHIA STEAMBOAT COMPANY v. NORTON, 248 U.S. 408 (1931).

The Court of Appeals for the Fifth Circuit cited as controlling and in support of its decision, this Court's opinion in the NORTON case. The Court of Appeals thus held that the method of computation employed by the Deputy Commissioner and approved by the District Court was in accord with this Court's decision in the NORTON case.

The Court of Appeals for the Fifth Circuit does not stand alone in its interpretation of the NORTON case as approving the method employed by the Deputy Commissioner. The Court of Appeals for the Ninth Circuit also has held that the method of computation here used by the Deputy Commissioner was the one required by the decision of this Court in the NORTON case. That Court said, in CRESCENT WHARF & WAREHOUSE COMPANY v. PILLSBURY, 54 F. 2d 1077, at p. 1077:

> "If we assume, as appellant contends we should, that the employee's injury in the case at bar is a hand injury, and if we apply the decision of the Supreme Court in Baltimore & Philadelphia, etc., the Norton, *supra*, the result would be as follows: Healing period, 32 weeks; no excess under the provisions of 33 USCA, Sec. 908, Subd. (c) (22); compensation for loss of hand, 244 weeks; subtract healing period of 32 weeks, balance 212 weeks; 45 per cent disability, 95.4 weeks (being 45 per cent of 212 weeks)"

Thus, both the Court of Appeals for the Fifth Circuit in this case and the Court of Appeals for the Ninth Circuit have each expressly held that the method of computation employed by the Deputy Commissioner here is a method sanctioned and approved by this Court in the NORTON case.

But petitioner argues that the NORTON case actually ap-

plies the formula for which he contends. The difficulty here is that petitioner makes the same mistake in reading the NORTON case that he does in reading the plain and unambiguous language of the Act.

In construing the statutory provisions, petitioner completely ignores the Congressional mandate contained in Section 8(c)(19), (33 U.S.C.A., Section 908(c)(19)), that compensation for permanent partial loss of use of a hand be *proportionate* to the loss of use of the entire hand. Petitioner's brief, in arguing the NORTON case, completely ignores the language of this Court, wherein it states that as far as the percentage of permanent partial disability is concerned, the claimant is entitled to "*proportionate compensation*" and to compensation at the "*proportionate rate.*"

At p. 415, the Court states:

> "* * * The language of (22) on which petitioners rely, when taken in context and construed in harmony with the purpose of the Act, means that the full rate shall be allowed for the duration of the healing time and that the *proportionate rate* shall apply to the balance of the established compensation period.
>
> "The decree will be modified so as to allow the full rate of $24.04 for only thirty-two weeks and *proportionate compensation* of 40% for two hundred eighty-two weeks." (Emphasis supplied.)

Petitioner, in arguing that the NORTON case supports his position, completely ignores the language of this Court relating to the "proportionate rate" and "proportionate compensation". Petitioner does precisely the same thing in interpreting the statutory language.

Actually, in the NORTON case, this Court clearly states that compensation for permanent partial loss of use of a member is to be proportionate. The Court, in fact, ap-

proves and holds that one of the two methods set out *supra*, page 3, is the correct way to compute the compensation due a claimant for a given percentage of permanent partial disability to a specific member of the body.

At the time the NORTON case was before this Court, the period of temporary total disability affected the statutory period for permanent partial disability. This problem, however, no longer exists since the amendment of the Longshoremen's and Harbor Workers' Compensation Act in 1934. At that time, the statute was amended to permit the workman to recover at the full compensation rate for all of the temporary total disability, but set a flat period of 212 weeks for which he was to receive proportionate compensation for a partial loss or loss of use of a hand.

In the NORTON case the Deputy Commissioner had first determined the maximum weekly compensation rate which was two-thirds of his average weekly wages not to exceed $25.00 per week, and this came to $24.04. The percentage of disability to the arm was forty per cent and the Deputy Commissioner applied this forty per cent to the statutory period, or number of weeks, and allowed compensation at the full weekly rate of $24.04 for this shortened period of weeks. This is the same as Method No. 1 set out *supra*, page 3. This computation was expressly approved and affirmed by the District Court for the Eastern District of Pennsylvania (40 F. 2d 530) and by the Court of Appeals for the Third Circuit (48 F. 2d 57).

This Court also approved this method of computation. But it recognized that there was still another possible method by which the compensation due could be computed which is still proportionate as required by the Act.

This other method, as this Court indicated, is to pay the proportionate rate, that is forty per cent of the maximum weekly compensation rate of $24.04, which was $9.61 for

the full statutory period of weeks. This is exactly the same as Method No. 2 set out, *supra*, page 3.

This Court recognized these two permissible methods in two short sentences (p. 411):

> "The Deputy Commissioner did not apply the *proportionate rate*, $9.616, to the 280 weeks remaining but added to the 34 weeks 40 per cent of 280 (being 112) and applied the full rate for 146 weeks. The total of the payments is the same in either case." (Emphasis supplied.)

This Court expressly refused to consider which of these two methods was to be used. It did so because this question was not raised before in either case. The Court stated (p. 411):

> "* * * The computation employed shortens the statutory period and correspondingly increases the weekly payments. Petitioners raise no question as to that feature of the award, and therefore we need not consider whether it is consonant with the Act."

The NORTON case shows quite plainly that under the Longshoremen's and Harbor Workers' Compensation Act either

(1) The per cent of disability is to be applied to the statutory period of weeks, and full compensation paid for this shortened period (Method No. 1, *supra*, p. 3), or

(2) The per cent of disability is to be applied to the weekly compensation rate payable under the Act, not to exceed the statutory maximum of $35.00 per week, and compensation paid at the *proportionate rate* thus obtained for the full statutory period (Method No. 2, *supra*, p. 3).

As this Court has said, the amount of money received is the same in either case.

Other Courts in Accord With Norton Case

The NORTON case is not the only one that has approved one of these two methods of computation. No less than five other courts, including the District Court and the Court of Appeals in the NORTON case, have followed Method No. 1 (*supra*, p. 3) and held that the per cent of disability is to be applied to the statutory period and that compensation is to be paid at the full weekly rate for this shortened period of weeks.

Southern Stevedoring & Contracting Company v. Sheppeard, 1 F. Supp. 867 (D.C. Tex., 1932);
Crescent Wharf & Warehouse Company v. Pillsbury, 54 F. 2d 1077 (9 C.C.A. 1932);
Luckenbach Steamship Company, Inc. v. Norton, 23 F. Sup. 829 (E.D. Pa., 1938);
Baltimore & Philadelphia Steamboat Company v. Norton, 48 F. 2d 57 (3 C.C.A. 1931);
Baltimore & Philadelphia Steamboat Company v. Norton, 40 F. 2d 530 (E.D. Pa., 1930).

Still another court has followed Method No. 2 (*Supra*, p. 3) and allowed compensation for 205 weeks at twenty-five per cent of the full statutory compensation rate. See GRAYS HARBOR STEVEDORE COMPANY v. ROTHCHILD & COMPANY, 36 F. 2d 814 (D.C. Wash., 1929).

The Sheppeard Case—The District Court Below Decided Landmark Case in 1932

In what has now become a leading case on this question, the District Court below (Judge Kennerly) expressly held that the sum due for permanent partial loss of use of a

specific member was obtained by applying the percentage of disability to the statutory period of weeks and paying the full weekly compensation rate for this shortened period of time. This was the method used by the Deputy Commissioner in this case. This was in the case of SOUTHERN STEVEDORING & CONTRACTING COMPANY v. SHEPPEARD, 1 F. Supp. 867 (1932), in which the District Court below was confronted with the specific problem of which of the methods was the one to be employed in computing compensation for permanent partial loss of use of a specific member.

In the SHEPPEARD case the weekly compensation rate was $20.00 and the percentage of disability was ten per cent. In laying down the method to be followed in computing this man's compensation for the ten per cent permanent partial loss of use of his foot, the District Court below said in part, at p. 868:

> "Libellant does not dispute the amount, but its complaint is that the deputy commissioner should have allowed, and this court should now allow, 183 weeks at $2 per week, instead of 18.3 weeks at $20 per week. The result ($366) is the same in both instances. The difference is that, under libellant's contention, it may pay the $366 over a period of 183 weeks, instead of over a period of 18.3 weeks. But libellant's contention in this respect is not sustained by the wording of section 908. In reaching the amount to be paid to employees under section 908, there are two features considered: One, the weekly rate; the other, the compensation period. Throughout the section, the weekly rate is fixed at 66 2/3 per cent of the average weekly wages; in this case, $20. The compensation period is determined by the extent of the injury. For instance, for an arm loss, the compensation period is fixed at 312 weeks. Subdivision 1, section 908. For a foot loss, it is fixed at 205 weeks. Subdivision (c) (4), section 908. Under subdivision (c) (19), it is said that compensation for per-

manent partial loss, or loss of use, of a member may be for the proportionate loss, or loss of use, thereof. This means that, if the use of a foot is lost, the compensation period is 205 weeks. If, as in this case, there is an injury to the foot equivalent to 10 per cent of the disability employee would have sustained if he had had the loss of a foot, or the loss of the use of a foot, the compensation period is 10 per cent of the total loss period. Hence, as stated, the compensation period is fixed by adding to 205 weeks, the 10 weeks of temporary total disability, producing 215 weeks, deducting 32 weeks, leaving 183 weeks, and taking 10 per cent of what is left, which produces the compensation period of 18.3 weeks, which, at $20 per week, the weekly rate, is $366."

This decision of the District Court below has been consistently followed by other courts. It has been the unchallenged guide to the administrative agency administering this Act for over 20 years.

One Court Uses Method No. 2

The District Court of Washington in GRAYS HARBOR STEVEDORE COMPANY v. ROTHCHILD & COMPANY, 36 F. 2d 814 (1929) has held that Method No. 2, *supra*, p. 3, should be used. That is, that compensation should be paid for the full statutory period of weeks, with the proportionate rate determined by multiplying the per cent of loss of use by the maximum statutory compensation rate.

New York Courts in Accord With Norton Case

The Longshoremen's and Harbor Workers' Compensation Act was modeled after the New York Workmen's Compensation Law and for this reason, decisions of the courts of that state under that Act are highly persuasive. HARTFORD ACCIDENT & INDEMNITY CO. v. HOAGE, 85 F.

2d 411 (App., D.C.); MARSHALL v. MAHONEY, 56 F. 2d 74 (9 C.C.A.).

Under the New York Workmen's Compensation Act, whose provisions on the question involved here are substantially the same as those in the Longshoremen's Act, the courts of that state have approved and affirmed the method of computation employed by the Deputy Commissioner in this case. That is, the per cent of permanent partial disability is applied to the statutory number of weeks, so that the period during which the payments are made is shortened and compensation paid at the maximum weekly rate. PHONVILLE v. NEW YORK AND CUBA STEAMSHIP CO., 226 N. Y. 622, 123 N.E. 258.

Sheppeard Case and Grays Harbor Case Not Distinguishable

At page 8 of this brief petitioner seeks to declare the SHEPPEARD case and the GRAYS HARBOR case "not in point". Petitioner attempts to do so by stating that 66 2/3 per cent of the average weekly wage in those cases was less than the statutory maximum (at that time $25.00 per week). The same fact existed in the NORTON case where 66 2/3 per cent of the average weekly wage was $24.04. If by this token the SHEPPEARD case and GRAYS HARBOR case are "not in point", then the NORTON case, which Petitioner so laboriously tries to convert to his own use, is also "not in point".

Settled Administrative Practice Supports Deputy Commissioner and Courts Below

The method adopted by the Deputy Commissioner in this case and by the Courts below of allowing compensation at the full statutory rate for a shortened period of weeks has been the method formally adopted and consistently

employed by the United States Employees' Compensation Commission almost since the beginning of this Act Longshoremen's Act, Opinion No. 34, 1929 A.M.C. 100. (Printed in full in Appendix A, p. 23), expressly adopts the formulae used here. This fact alone of a settled administrative construction of a statute is entitled to great weight and should not be overturned except for cogent reasons. See:

Billings v. Truesdell, 321 U.S. 542 (1944);
United States of America v. Chicago, North Shore & Milwaukee Railroad Company, 288 U.S. 1 (1933).

Surely this is a matter within the special competence of the administrator, and where, as here it has formally adopted a rule that has a reasonable basis in its choice under the Act this choice should be accepted.

Petitioner Seeks Weekly Compensation Rate of $68.66 Whereas Statutory Maximum Is $35 Per Week

In the face of this overwhelming weight of authority, petitioner seeks to have his compensation computed by first taking two-thirds of his average weekly wages of $103.00, which gives a sum of $68.66, then take fifteen per cent of this $68.66, or $10.30, and pay this to him for the statutory period of 212 weeks. This would give petitioner the total sum of $2,183.60. This method of computation, however, is clearly erroneous, for it ignores completely the plain mandate of Section 6(b) (33 U.S.C.A., Section 906(b)) of the Longshoremen's and Harbor Workers' Compensation Act, which says that compensation, for disability shall not exceed $35.00 per week. Petitioner's method of computation uses a compensation rate per week of $68.66. If petitioner really wants his compensation paid in small sums over a period of 212 weeks, rather than at the full weekly

rate for a shortened period of weeks, then after this figure of $68.66 is obtained it must first be reduced to the statutory maximum of $35.00 per week. Then the percentage of loss of use of the specific member (15%) is applied to determine the proper rate ($5.25) at which the payment should be made each week.

While it is not too clear from the opinion, a contention similar to the one made by the petitioner may well have been made in one of the cases heretofore discussed, GRAYS HARBOR STEVEDORE COMPANY v. ROTHCHILD & COMPANY, 36 F. 2d 814 (D.C. Wash., 1929). If so, such a contention was expressly overruled by the court when it said, at p. 816:

> "To the extent that the deputy's award and order exceeds 35 weeks at full statutory compensation, plus 205 weeks at 25 per cent of full statutory compensation, if permanent partial disability so long endures subsequent to said 35 weeks, it is not in accordance with law and is set aside."

This quoted language from the District Court in Washington indicates quite clearly that in no event is the percentage of loss of use of a member to be applied to any sum greater than the full statutory compensation rate. The average weekly wage of this man is not shown by the opinion, but the language of the court is plain and unambiguous. It indicates quite clearly that if an employee desires to draw the compensation for the full 205 weeks, it shall be computed by taking the percentage of loss of use into the full statutory compensation rate, which in the present case is $35.00.

What petitioner is really trying to do is not spelled out in his brief in this Court as plainly and clearly as it was in his brief before the District Court. In that brief, the petitioner said, at pp. 6 and 7:

Petitioner's Real Contentions Exposed

> "The Deputy Commissioner's findings, as stipulated to by the parties, establishes libellant's diabilities to be fifteen per cent (15%) of the loss of the use of his hand * * * Therefore, the Deputy Commissioner's finding that libellant has suffered a fifteen per cent (15%) disability is, of course, a finding that libellant has sustained a fifteen per cent (15%) loss of *capacity to earn wages* entitling him to compensation of fifteen per cent (15%) of his stipulated weekly wages for a period of two hundred twelve (212) weeks * * *."

As this quotation from his brief below indicates, what the petitioner really seeks to do is to obtain compensation for a period of 212 weeks in the same amount that he would have been entitled to had his *entire* physical structure suffered a 15% permanent partial disability. In short, what petitioner seeks here is for this Court to award him compensation equivalent to that to which he would have been entitled had he suffered a permanent partial disability of 15%, not simply to one hand, but to his entire body. That petitioner does not cast his argument here in such candor does not make his objective any less plain or insupportable.

We are not here concerned with a general loss of a man's working or earning capacity in relation to his entire body, but with a specific loss of 15% of the use of a specific member of the body.

We are here concerned with the question of what is *proportionate compensation* for a 15% loss of use of a hand in relation to the amount of money that petitioner would be entitled to had he lost the entire hand.

Texas Cases of No Benefit Here

Petitioner seeks to rely on decisions under the Workmen's Compensation Act of Texas, particularly TEXAS EMPLOYERS'

INSURANCE ASSOCIATION v. HOLMES, 196 S.W. 2d 390 (1946), a five-to-four decision by the Supreme Court of Texas in which there was one concurring opinion and two dissenting opinions in addition to the majority opinion of the court. But this case and the others cited by petitioner under the Texas Act (brief, pp. 9, 10, 11) are of no benefit to this Court in determining the proper computation under the Longshoremen's Act. The Workmen's Compensation Act of Texas and the Longshoremen's and Harbor Workers' Compensation Act are two separate and distinct acts. Their language is so dissimilar that the construction placed on the Texas Act is of no benefit to this Court in construing the Longshoremen's and Harbor Worker's Compensation Act.

For the convenience of the Court, there is set out in parallel all of the particular provisions of these Acts dealing with the benefits to be paid for permanent partial loss of use of a hand. The difference in the language of the two statues may be clearly seen.

Texas Workmen's Compensation Act	*Longshoremen's and Harbor Workers' Compensation Act*
Revised Civil Statutes of Texas, 1925, Article 8306, Section 12.	33 U.S.C.A., Section 901 ff.
For the injuries enumerated in the following schedule the employee shall receive in lieu of all other compensation except medical aid, hospital services and medicines as elsewhere herein provided, a weekly compensation equal to sixty per cent (60%) of the average weekly wages of such employee but	Sec. 906(b) Compensation for disability shall not exceed $35 per week. * * *
	Sec. 8(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66-2/3 per centum of the average weekly wages * * * and

Texas Workmen's Compensation Act
(Continued)

not less than Nine Dollars ($9) per week nor exceeding Twenty-five Dollars ($25) per week, for the respective periods stated herein, to-wit:

* * *

For the loss of a hand, sixty per cent (60%) of the average weekly wage during one hundred and fifty (150) weeks.

* * *

In the foregoing enumerated cases of permanent partial incapacity, it shall be considered that the permanent loss of the use of a member shall be equivalent to and draw the same compensation as the loss of that member.

* * *

* * * The compensation paid therefor shall be sixty per cent (60%) of the average weekly wages of the employees but not to exceed Twenty-five Dollars ($25) per week, multiplied by the percentage of incapacity caused by the injury for such period not exceeding three hundred (300) weeks as the board may determine.

Longshoremen's and Harbor Workers' Compensation Act
(Continued)

shall be paid to the employee, as follows:

(3) Hand lost, two hundred and twelve weeks' compensation * * *

(19). Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

* * *

Nowhere does the Texas Act have a requirement that the compensation for permanent partial loss of use of a member be proportionate to that for the loss of the whole member. Even the statutory period of weeks is different, compensation being paid for more than a year longer under the Longshoremen's Act than it is under the Texas Act.

No Showing Case Presents Matter of General Importance

Petitioner advances, in addition to his claim of an alleged conflict with the decision of this Court in the NORTON case, "three other reasons" for granting this writ. (See Petition, pp. 5, 11, 12.) The sum and substance of these three alleged reasons are that it is an important question involving the construction and intent of an act of Congress which the Court of Appeals for the Fifth Circuit has not followed, and that the Act has not been liberally construed to conform with the Congressional intent.

There is no showing in the petition that the question sought to be reviewed by this Court has any likelihood of a recurrence. Since the effective date of this Act, July 1, 1927, through the fiscal year 1949, the question of computation of the compensation due a man for permanent partial disability to a specific member of his body has been the subject of judicial review in only five cases. During this period of time, there was a total of 1,216 cases which were filed seeking judicial review of compensation awards under the three coverages (Longshoremen, District of Columbia, Defense Bases) of the Act. Annual Report, Bureau of Employees' Compensation, Federal Security Agency, 1949, pp. 11-12. Such a small number, 5/1216ths, is hardly a matter of recurring importance.

Especially is this so in the face of the tremendous volume of accidental injuries or deaths where benefits are paid with-

out litigation. For example, during the fiscal year 1950, 101,162 injuries and 259 deaths were reported, and $9,124,-843 was actually paid in compensation benefits. See 38th Annual Report of Secretary of Labor (1950), pp. 103-112, p. 112(c).

Construction Below Does Not Thwart Congressional Intent

Similarily, see the Cumulative Statutes (Summary of Injuries reported to the Bureau of Employees' Compensation under the Longshoremen and Harbor Workers' Compensation Act by Fiscal Years from July 1, 1944 to June 30, 1952) for the fiscal years 1944 to 1952 which indicates 159,998 cases involving at least one day's disability. Out of this number only 219 were appealed to Court. Were this a matter of general recurring importance in the daily administration of the Act one would expect to find the issue presented in more than the microscopic fraction of .13 of one (1) per cent of such cases.

Nor is there any showing in the petition in any way that congressional intent has been thwarted. In making this argument, petitioner again ignores Section 8(c) (19) of the Act. (33 U.S.C.A., Sec. 908(c) (19)). This is the section which requires the compensation for permanent partial disability to be proportionate to that which would be paid for total disability. That Congress intended that the compensation for a partial loss of use should be proportionate to that which a man would receive for the total loss of use of a specific member is plainly and concisely stated in this section of the Act. We do not have to look behind the statutory language to ascertain the intent of Congress in this situation, for it has been clearly stated in no uncertain terms.

Cannot Amend Statute Under Guise of Liberal Construction

On p. 12 of his brief, petitioner finally resorts to the guise of liberal construction in an effort to amend the statute. But as this Court has said in PILLSBURY v. UNITED ENGINEERING COMPANY, 342 U.S. 197, a liberal construction of a statute is one thing, but to read language into it that is not there, or to interpret it in such a way as to do violence to the plain statutory provisions is quite another. Under the guise of liberal construction, petitioner would have this Court completely ignore the plain statutory provision which requires that such compensation be proportionate.

Petitioner Ignores Plain Statutory Mandate

Petitioner's contentions here are made completely ignoring the provisions of Section 8(c)(19) (33 U.S.C.A., Sec. 908(c)(19)) that compensation for partial loss of use of a member be *proportionate* to that compensation due for the loss of use of the whole member. The Act fixes the economic value of a hand at $35 per week for 212 weeks, or the total sum of $7,420. Petitioner has already been paid 15% of the economic value of his whole hand, that is, $1,113. To adopt petitioner's contention would give him the equivalent of 29% loss of use of his whole hand, not *proportionate* compensation of 15%, but compensation for disability nearly twice as great as he actually has. Even a strained and distorted construction of the statute cannot justify such a result.

Conclusion

This method of computation advanced by libellant is not *proportionate* as required by the statute. Such a computa-

tion is in direct conflict with the plain and unambiguous language of the statute which requires the compensation to be *proportionate*. The method is also directly contrary to all of the decisions of all of the courts who have been called upon to decide this question. The appellee, Texas Employers' Insurance Association therefore respectfully submits that the Deputy Commissioner's computation and award is in all respects in accordance with law, and that it and the judgment of the District Court below should be in all respects affirmed.

Respectfully submitted,

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Copies of the within brief were served by me on Messrs. Mandell & Wright, Republic Building, Houston, Texas, attorneys for petitioners, by mailing copies thereof to them on this the _____ day of October, 1953.

ROYSTON & RAYZOR,
Of Counsel

APPENDIX A

Reported in 1929 AMC 100

Longshoremen's Act, Opinion No. 34

United States Employees' Compensation Commission, Washington, Jan. 3, 1929.

LONGSHOREMEN'S ACT - 162. Permanent Partial Disability - 163. Temporary Total Disability.

When compensation is allowed under section 8(c)(19) of the Longshoremen's and Harbor Workers' Compensation Act, 1927, for permanent partial disability on account of partial loss or partial loss of use of a schedule member, any temporary total disability resulting from the same injury is to be first allowed for under section 8(b), and to this there is to be added, on account of the permanent partial disability, an allowance to be computed as follows: to the schedule allowance for the total loss of the member add any excess of the actual healing period over the normal healing period as fixed in section 8(c)(22); from the sum of these deduct the actual healing period for which allowance of temporary total disability has been made; and of this remainder take the percentage or other fractional part corresponding to the proportion of loss or loss of use of the member as found. The percentage or other fraction of the scheduled period as thus determined when added to the period of temporary total disability makes the total period of compensation to be awarded.

There has been submitted to the United States Employees' Compensation Commission the question of the proper method of computation of compensation for permanent partial disability under section 8(c) of the Longshoremen's and Harbor Workers' Compensation Act 1927, when there is an accompanying temporary total disability and the permanent partial disability is a *partial loss or partial loss of use* of a member.

The pertinent parts of section 8 of the Act are quoted as follows:

Sec. 8. Compensation for disability shall be paid to the employee as follows:

"(b) Temporary total disability: In case of disability total in character but temporary in quality 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

"(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66 2/3 per centum of the average weekly wages, and shall be paid to the employee, as follows:

"(1) Arm lost, three hundred and twelve weeks' compensation.

"(2) Leg lost, two hundred and eighty-eight weeks' compensation.

"(3) Hand lost, two hundred and forty-four weeks' compensation.

"(4) Foot lost, two hundred and five weeks' compensation."

* * * * * * * * * * * * *

"(12) Fourth finger lost, fifteen weeks' compensation."

* * * * * * * * * * * * *

"(18) Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for loss of the member.

"(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member."

* * * * * * * * * * * * *

"(22) In case of temporary total disability and permanent partial disability, both resulting from the same injury, if the temporary total disability continues for a longer period than the number of weeks set forth in the following

schedule, the period of temporary total disability in excess of such number of weeks shall be added to the compensation period provided in subdivision (c) of this section: Arm, thirty-two weeks; leg, forty weeks; hand, thirty-two weeks; foot, thirty-two weeks; * * * fourth finger, eight weeks; * * *."

As typical of cases involving this question the following may be cited:

"I. An employee as the result of an injury to his hand suffered 45 weeks total disability followed by permanent partial loss of use of the hand amounting to 25 per cent.

"II. An employee as the result of an injury to his leg suffered 40 weeks' total disability followed by permanent partial loss of use of his leg amounting to 50 per cent.

"III. An employee as the result of an injury to the 4th finger of his right hand suffered 8 weeks' total disability followed by partial loss of use of his 4th finger amounting to 50 per cent.

"IV. An employee as the result of an injury to his foot suffered 25 weeks' total disability followed by partial loss of use of his foot amounting to 10 per cent."

It is first to be noted that section 8(b) provides for compensation for temporary total disability "during the continuance thereof". There is no qualification or restriction to this provision, nor is there in section 8(c) either expressed or implied any intention that the schedule therein shall diminish the right clearly given by section 8(b).

While, however, it is manifestly not intended that the schedule allowances in section 8(c) shall supersede or diminish the right under section 8(b), it is apparently not intended that the two rights (when they arise out of the

same injury) shall be so wholly unrelated as to run consecutively,—that is to say, that the schedule allowance under section 8(c) shall begin to run only when the total disability under section 8(b) has ceased,—for section 8(c)(22) clearly indicates that the two rights shall run concurrently to a certain extent; that is to say, in the case of the total loss of a schedule member, the period of temporary total disability and the allowance for permanent partial disability run together during the normal healing period fixed in section 8(c)(22), but as to any temporary total disability in excess of such normal healing period they run consecutively.

No difficulty is encountered in applying this rule when the permanent partial disability consists of a total loss or total loss of use of a schedule member; but when there is a partial loss or partial loss of use of a member under the schedule, as contemplated in section 8(c)(19), a somewhat different problem is presented. That is to say, how is the fraction of the schedule allowance corresponding to the fractional loss or fractional loss of use of the member to be computed and applied in relation to the period of temporary total disability of the actual healing period? In other words, shall this fraction be first calculated upon the schedule allowance and the temporary total disability of the healing period run concurrently with the resulting fractional period, or shall the healing period run first and count against and be deducted from the schedule allowance and the fraction representing the proportionate permanent partial disability be applied to the remainder of the schedule allowance?

For the sake of illustration and clearness of consideration these two methods will be applied to the several cases above stated, as follows:

I. The schedule allowance for total loss of a hand is 244 weeks. Take first 25 per cent of 244 weeks, or 61 weeks; to this add the 13 weeks excess healing period, making 74

weeks the total allowance under one method. Or: Take first the actual healing period of 45 weeks; to this add 25 per cent of the remainder of the 244 weeks augmented by the 13 weeks excess healing period (that is, 25 per cent of 244 plus 13 minus 45), or 53 weeks, making 98 weeks the total allowance under the other method.

II. The schedule allowance for total loss of a leg is 288 weeks. Take first 50 per cent of 288 weeks, or 144 weeks; to this add nothing, there being no excess healing period, making 144 weeks the total allowance under the one method. Or: Take first the actual healing period of 40 weeks; to this add 50 per cent of the remainder of the 288 weeks (that is, 50 per cent of 288 minus 40), or 124 weeks, making 164 weeks the total allowance under the other method.

III. The schedule allowance for loss of a fourth finger is 15 weeks. Take first 50 per cent of 15 weeks, or 7.5 weeks; to this add nothing, there being no excess healing period, making the total allowance under section 8 (c) 7.5 weeks; but as this is less than the actual healing period of 8 weeks for which compensation is allowed in any case under section 8(b), the total allowance by the one method would be the 8 weeks actual temporary total disability, nothing being added thereto on account of the permanent partial disability. Or: Take first the actual healing period of 8 weeks; to this add 50 per cent of the remainder of the 15 weeks (that is, 50 per cent of 15 minus 8), or 3.5 weeks, making 11.5 weeks under the other method.

IV. The schedule allowance for total loss of a foot is 205 weeks. Take first 10 per cent of 205 weeks, or 20.5 weeks; to this add nothing, there being no excess healing period, making the total allowance under section 8(c) 20.5 weeks; but as this is less than the actual healing period of 25 weeks for which compensation is allowed in any case under section 8(b), the total allowance by the one method would be the

25 weeks actual temporary total disability, nothing being added thereto on account of the permanent partial disability. Or: Take first the actual healing period of 25 weeks; to this add 10 per cent of the remainder of the 205 weeks (that is, 10 per cent of 205 minus 25), or 18 weeks, making 43 weeks under the other method.

It is apparent that to take first the fraction of the schedule allowance and permit the whole of the temporary total disability of the healing period to run concurrently therewith will in many cases result in providing no compensation whatever on account of the permanent partial disability. For example, in cases III and IV, above, this method results in giving compensation only for the temporary total disability of the actual healing period so that in such a case the employee suffering a permanent disability as the result of the injury receives exactly the same compensation that he would receive had he experienced a complete recovery from the injury without any ensuing permanent disability. Being entitled to the compensation for temporary total disability under section 8 (b), this method gives no effect to section 8(c). Such a result is manifestly contrary to the spirit and purpose of the Act.

On the other hand the other method of computation exemplified above always provides compensation for the permanent partial disability proportionally related to the degree of such disability and to the length of the healing period. Moreover, this proportional relationship is the same as that expressly provided for the cases of total loss or total loss of use of a member; for the application of section 8(c) (22) results, in the case of *total* loss or total loss of use of a member, in causing the *whole* of the normal healing period to run concurrently with the schedule allowance for the loss of such member, any excess of such healing-period disability running consecutively with such allowance; and correspond-

ingly, the application of the second method of computation above discussed similarly results in causing the *fraction* of the normal healing period proportionate to the permanent partial disability to run concurrently with the *fractional* part of the schedule allowance corresponding to the permanent partial disability found, the remainder of the healing period and any excess running consecutively.

It would seem, therefore, that this method is not only in accord with the general spirit and purpose of the Act in that it provides in every case some calculable compensation for every disability incurred, whether temporary or permanent, but that it is as nearly as possible in accord with the strict letter of the rule expressly provided for the corresponding basic situation of total loss.

The Commission therefore concludes that where there is an injury to a member included in the schedule in section 8(c), and a permanent partial disability less than the total loss or total loss of use of such member results therefrom, the total compensation therefor provided by the Act is found by allowing first, under section 8(b), the full period of any resulting temporary total disability, and second, under section 8(c)(19) such fractional part of the remainder of the schedule allowance (increased in some cases under sub-section (22) of section 8 (c) for the member affected over and above such period of actual temporary total disability as shall be equal to the fraction of permanent loss or permanent loss of use of the member affected.

This is accordingly adopted as a rule of interpretation in awarding compensation in cases involving the application of section 8(c)(19) of the Longshoremen's and Harbor Workers' Compensation Act.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	4
Conclusion	10
Appendix	11

CITATIONS

Cases:

Baltimore and Philadelphia Steamboat Co. v. *Norton*, 284 U. S. 408 — 8, 9

Broderick v. *Industrial Commission*, 224 Pac. 876 — 9

Knoxville Power and Light Co. v. *Barnes*, 156 Tenn. 184, 299 S. W. 772 — 9

Lewis v. *Allied Contractors, Inc.*, 225 N. W. 770 — 9

Maryland Casualty Co. v. *Laughlin*, 29 F. 2d 343 — 10

Orlando v. *F. Ferguson and Son*, 90 N. J. Law 553, 102 A. 155 — 9

Phonville v. *New York and Cuba SS. Co.*, 226 N. Y. 622 — 9, 12

Richardson v. *Maryland Casualty Co.*, 41 Ga. App. 520, 153 S. E. 524 — 9

Spurgeon v. *Iowa and Missouri Granite Works*, 196 Iowa 1268, 194 N. W. 286 — 9

Texas Employers' Insurance Association v. *Holmes*, 196 S. W. 2d 390 — 10

Statutes:

Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U. S. C. 901 *et seq* — 2

Sec. 6 (b) — 3, 5, 11

Sec. 8 (c) — 3, 5, 6, 8, 11

New York Workmen's Compensation Law, 64 McKinney's Cons. Laws 1, *et seq.*, Sec 15 — 2, 11

Texas Workmen's Compensation Law, Revised Civil Statutes of Texas, 1925, Art. 8306, Sec. 12 — 2, 12

277780—53

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 355

W. B. FOLLETT, PETITIONER

v.

HUGH A. VORIS, DEPUTY COMMISSIONER

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Southern District of Texas (R. 35) is reported at 104 F. Supp. 827. The opinion of the Court of Appeals for the Fifth Circuit (R. 47) is reported at 205 F. 2d 542.

JURISDICTION

The judgment of the Court of Appeals was entered on June 26, 1953 (R. 50). The petition for writ of certiorari was filed on September 17, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, in the computation of compensation, under Section 8 (c) of the Longshoremen's and Harbor Workers' Compensation Act, for permanent partial loss of use of a member of the body, the deputy commissioner erred in multiplying the percentage of disability by the number of weeks for which compensation is payable for total loss of use of that member, and multiplying this product in turn by the maximum weekly payment allowed by the Act.

STATUTES INVOLVED

The relevant provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U. S. C. 901 *et seq.*, the New York Workmen's Compensation Law, 64 McKinney's Cons. Laws 1 *et seq.*, and the Texas Workmen's Compensation Law, Art. 8306 (12), Vernon's Revised Civil Statutes of Texas (1953 Supp.), are set forth in the Appendix, *infra* pp. 11–12.

STATEMENT

On December 27, 1949, petitioner, while in the employ of the Southern Stevedoring Co., Inc., as a longshoreman at Houston, Texas, was injured aboard the SS. *James McKay,* then afloat upon the navigable waters of the United States. Upon his claim for compensation under the Longshoremen's and Harbor Worker's Compensation Act, the petitioner, his employer and the insurance

carrier stipulated that the disability amounted to a 15 per cent partial permanent disability of his left hand. After investigation, the deputy commissioner found that the average earnings of the petitioner at the time of his injury were $103 per week; that from December 28, 1949, to March 7, 1950, he necessarily sustained a loss of $21 per week on account of partial disability resulting from his injuries, entitling him to compensation at $14 per week for ten weeks in the sum of $140; that he had been paid compensation in the sum of $173.20, an overpayment of $33.20; that as a result of the injury petitioner had a permanent partial disability equivalent to 15 per cent of such disability as he would have sustained had he lost his hand; and that for this disability he was entitled to 31.8 weeks' compensation at $35 per week, amounting to $1,113.[1] (R. 31–32.) An award was entered, accordingly, on April 3, 1951. (R. 33).

The deputy commissioner arrived at the $1,113 figure by allowing petitioner compensation at the rate of $35 per week, the maximum allowed by Section 6 (b) of the Act (Appendix, *infra*, p. 11),[2] for 31.8 weeks, which was 15 per cent of

[1] The deputy commissioner also found that the employer and insurance carrier were entitled to a credit for the $33.20 overpayment, leaving a balance of $1,079.80. (R. 33.)

[2] Section 8 (c) of the Act (Appendix, *infra*, p. 11), allows an award of 66⅔ percent of the average weekly wage of the claimant. Since the claimant's average weekly wage in this case was $103 per week, and since 66⅔ percent of that

the 212-week period during which petitioner would have collected compensation had he suffered a permanent total disability of his left hand. Alleging that this formula erroneously computed the compensation to which he was entitled as a matter of law, petitioner sought a mandatory injunction in the District Court for the Southern District of Texas against the enforcement of the award and for the substitution of an award according to the formula he proposed. This formula would have computed the award in either of two ways: (1) 15 per cent of 66⅔ per cent of the claimant's average weekly wage for a period of 212 weeks, or (2) 15 per cent of 212 weeks multiplied by 66⅔ per cent of his average weekly wage. Either of these methods would have amounted to $2,141.20 (R. 10), instead of the $1,113 awarded by the deputy commissioner. The District Court upheld the compensation formula utilized by the deputy commissioner (R. 37) and approved his award (R. 41), and the Court of Appeals for the Fifth Circuit unanimously affirmed (R. 50).

ARGUMENT

The courts below were clearly correct in approving the formula employed by the deputy commissioner for the calculation of compensation due for permanent partial disability. The language and

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amount would have exceeded the statutory maximum of $35 per week, the deputy commissioner made the award rate $35 per week.

purpose of the Act, as well as the long-settled administrative construction, establish beyond cavil that the formula employed is that intended by Congress in its adoption of the Act.

1. Section 8 (c) of the Act provides that in case of permanent partial disability the compensation shall be 66⅔ per cent of the average weekly wage and shall be paid to the employee as follows:

> (3) Hand lost, two hundred and twelve weeks' compensation.
>
> * * * * *
>
> (19) * * * Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

Section 6 (b) provides that "Compensation for disability shall not exceed $35 per week."

As the District Court found (R. 37), the settled administrative interpretation of the Act required that the compensation to which the petitioner was entitled be computed as the deputy commissioner had done: (*a*) Petitioner was entitled to compensation at the rate of 66⅔ per cent of his average weekly wage of $103; but, since this 66⅔ per cent would exceed the $35 per week maximum contained in § 6 (b) of the Act, the basis for computing petitioner's actual rate of compensation was that maximum, $35. (*b*) For a permanent partial disability occasioned by the total loss of his hand, petitioner would have been entitled to compensation at $35 per week for 212 weeks. (*c*) Thus, for a 15 per cent permanent partial dis-

ability of his hand, petitioner should receive compensation for 15 per cent of 212 weeks or 31.8 weeks. (*d*) The final award in the case would then be $1,113.

Petitioner, however, would adopt a different method of calculation. (*a*) He would take 66⅔ per cent of the employee's average weekly wage rate—without regard to the $35 weekly maximum—and then multiply that figure by 15 per cent. (*b*) If the result of that multiplication was not in excess of $35, he would multiply that result by 212 weeks to reach the final compensation award. (*c*) The final result in this case would be $2,141.20.

In mathematical form, the two computations would look like this:

Deputy commissioner:

[66⅔% × weekly wage rate] (but this product cannot be more than $35) × [percentage disability × number of weeks] = actual compensation award.

Petitioner:

[66⅔% × weekly wage rate] (but no maximum as to this product) × [percentage disability × number of weeks] = compensation award (but no more than $35 per week).

The fallacy of petitioner's formula is indicated by Section 8 (c) (19) (Appendix, *infra*, p. 11), the proportionalizing feature of the Act. According to that section, compensation awards for permanent disability to members of the body,

when such loss or loss of use of the member is less than total, are to be proportional to the amounts awarded for total loss or loss of use. But, under petitioner's theory, the actual award would be completely out of proportion to the actual ratio of the loss of use.

Thus, if there had been a 100 per cent disability here—*i. e.*, complete loss of the hand—petitioner's formula would yield $68.67 (66⅔%×$103×100%) for the weekly compensation rate. But this figure is in excess of $35, so that the actual award would have to be based upon the maximum, $35. The award for total disability, loss of use of the hand, would therefore be $35×212, or $7,420. However, for the actual 15 percent disability, petitioner's formula reaches a result of $2,183.60. This means that, although the ratio of the actual disability to the total disability is 15 per cent, the proportion between the awards would be 29 per cent ($2,183.60/$7,420).

Moreover, accentuating the untenability of petitioner's formula is the fact that, for greater percentages of disability, the awards under petititoner's method would not differ from those for total disability. Thus, had there here been a 50 per cent disability of the hand, the total weekly award would be, under petitioner's calculation, $34.33 (66⅔%×$103×50%), or a total of $7,277.96 ($34.33×212). In view of the fact that one who suffers a 100% loss of the use of his hand would receive virtually an identical amount under

petitioner's theory—*i. e.*, $7,420—it becomes quite clear that that interpretation would read the proportionalizing feature of Section 8 (c) (19), the very basis for awards for partial loss of use, right out of the Act.

On the other hand, under the formula of the deputy commissioner, the award for partial disability must always be proportional to an award for total disability to a member of the body. This is necessarily so, because that formula does not distort the $35 weekly maximum figure by diluting 66⅔ per cent of the average weekly wage by the percentage of disability, but rather maintains the $35 maximum as a constant, varying only the duration of compensation.

Accordingly, it is quite clear that the courts below did not err in approving the formula employed by the deputy commissioner to arrive at the petitioner's compensation award.

2. This method of calculation is the one which has been adopted in substantially all the States which, in interpreting workmen's compensation acts with similar structure and language, have passed upon the question.[8] Those courts have held that the number and not the amount of the weekly payments is the variable in computing compensation awards for a permanent disability

[8] Petitioner's contention that this Court approved the formula here advocated by petitioner in *Baltimore and Philadelphia Steamboat Co.* v. *Norton*, 284 U. S. 408, lacks merit.

which is less than total.[4] Of particular relevance in this regard is the decision of the New York Court of Appeals in *Phonville* v. *New York and Cuba SS. Co.*, 226 N. Y. 622, where, under virtually identical language (Appendix, *infra*, pp. 11–12) and in a similar factual situation, the New York Court stated, in arriving at the same conclusion as did the deputy commissioner and the courts below in the instant case:

> The act fixes but one rate of compensation for injuries. The workman is to receive two-thirds of his weekly wages not exceeding a certain sum. The extent of his injuries limits not the amount of these payments but the time during which they are to continue. If for the loss of a hand that time is 244 weeks, for the loss of three-fourths of the hand, it is 183 weeks. * * *

This Court there stated (pp. 411–412) "The computation employed [by the Commissioner] shortens the statutory period and correspondingly increases the weekly payments. Petitioners raise no questions as to that feature of the award, and therefore we need not consider whether it is consonant with the Act." Furthermore, in that case the injured longshoreman's actual average weekly wage was $36.06 and 66⅔ percent thereof was $24.04, or less than the then maximum rate of $25.00 per week fixed by § 6 (b); so that the problem of disproportionate awards occurring if a formula such as that advocated by petitioner were to be utilized was not presented.

[4] *Richardson* v. *Maryland Casualty Co.*, 41 Ga. App. 520, 153 S. E. 524; *Spurgeon* v. *Iowa and Missouri Granite Works*, 196 Iowa 1268, 194 N. W. 286; *Lewis* v. *Allied Contractors, Inc.*, 225 N. W. 770 (Neb., 1929); *Knoxville Power and Light Co.* v. *Barnes*, 156 Tenn. 184, 299 S. W. 772; *Broderick* v. *Industrial Commission*, 224 Pac. 876 (Utah, 1924); *Orlando* v. *F. Ferguson and Son*, 90 N. J. Law 553, 102 A. 155.

> Clearly the compensation for such proportionate loss is intended to be some fraction of the amount allowed for the total loss.

Petitioner's citation of the view of the Texas courts in formulating compensation awards for partial permanent disability as supporting his proposed formula (*Maryland Casualty Co.* v. *Laughlin*, 29 F. 2d 343 (C. A. 5); *Texas Employers' Insurance Association* v. *Holmes*, 196 S. W. 2d 390) is misconceived. There is no provision in the Texas act (Appendix, *infra*, p. 12) comparable to that in the Federal and New York acts that a partial loss of use of a member shall be compensated for in the proportion that the loss bears to the loss of the entire member—see discussion and cases cited in *Texas Employers' Insurance Association* v. *Holmes*, *supra*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1953.

APPENDIX

The Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended by the Act of May 26, 1934, 48 Stat. 806, and by the Act of June 24, 1948, 62 Stat. 602, 33 U. S. C. 901 *et seq.*, provides in pertinent part:

> Section 6 (b), 33 U. S. C., Supp. V, 906 (b):
>
> Compensation for disability shall not exceed $35 per week * * *.
>
> Section 8 (c), 33 U. S. C., Supp. V, 908 (c)
>
> (c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, * * *
>
> * * * * * *
>
> (3) Hand lost, two hundred and twelve weeks' compensation.
>
> * * * * * *
>
> (19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

The New York Workmen's Compensation Law, 64 McKinney's Cons. Laws 1 *et seq.*, provides in pertinent part:

> Section 15. Schedule in case of disability.
>
> * * * * * *
>
> 3. Permanent partial disability. In case of disability partial in character but permanent in quality the compensation shall be sixty-six and two-thirds per centum of the average weekly wages and shall be paid to

the employee for the period named in this subdivision, as follows:

Member lost	Number of weeks' compensation
* * *	* * *
c. Hand	244
* * *	* * *

(s) Partial loss or partial loss of use. Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

6. Maximum and minimum compensation for disability. Compensation for permanent or temporary partial disability, or for permanent or temporary total disability due to an accident * * * shall not exceed twenty-eight dollars per week * * *. [At the time of the decision in *Phonville* v. *New York and Cuba SS. Co.*, 226 N. Y. 622, the maximum was twenty dollars per week.]

The Texas Workmen's Compensation Law, Vernon's Revised Civil Statutes of Texas (1953 Supp.) 1925, Article 8306, provides in pertinent part:

Section 12. For the injuries enumerated in the following schedule the employee shall receive in lieu of all other compensation * * * a weekly compensation equal to sixty per cent (60%) of the average weekly wages of such employee * * * nor exceeding Twenty-five dollars ($25) per week, for the respective periods stated herein, to wit: * * *

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